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In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1172

SECURITY MUTUAL CASUALTY COMPANY,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF CUSHING, OKLAHOMA, a National Banking Association; ROBERT W. ADAMS; ROBERT W. ADAMS, Executor of the Will of Alma M. Blank; FRANK G. BERRY AND GEORGE M. BERRY, Executors of the Will of James E. Berry, deceased; LEVI SWINGLE; ARTHUR BLAINE IMEL; E. L. ROBERTS; D. A. GRIFFIN; AND GEORGE M. BERRY,
Respondents.

BRIEF OF RESPONDENT THE FIRST NATIONAL BANK OF CUSHING IN OPPOSITION

OPINIONS BELOW

Appendix B of the Petition for a Writ of Certiorari purports to contain the Findings of Fact, Conclusions of Law and Judgment of the trial court, the United States District Court for the Western District of Oklahoma. Not included therein, however, are Corrected Findings of Fact entered by the trial court on January 2, 1969. Those corrected findings are set forth in the appendix hereto.

STATEMENT OF THE CASE

Respondent bank instituted this action to recover under policies of fidelity insurance for substantial losses caused by the criminal and fraudulent acts of Swingle, the bank president. Petitioner denied liability on the ground that the bank, through its board of directors, had notice of Swingle's defalcations and the the bank's failure to give Petitioner notice thereof exonerated Petitioner from liability under the policies.

Petitioner, in a third-party action against the directors of the bank, alleged that the directors were individually liable for any losses sustained by the bank because they were either aware of Swingle's dishonest conduct and approved it or were negligent in not discovering his wrongdoing and terminating his employment.

The District Court, after a non-jury trial, rendered judgment for the bank for the sum of $560,814.47, plus certain items of prejudgment interest. Judgment in favor of Petitioner was awarded against Swingle and Roberts, another director who was proved to have been implicated with him. The third-party complaint was dismissed as to all of the remaining directors since the evidence failed to establish that they had any knowledge of Swingle's defalcations or that they were, in any respect, derelict in the performance of their duties. Rather, the evidence showed them to have been conscientious, diligent and entirely blameless. (A. 41, 42, 46)

In its appeal to the Court of Appeals, Petitioner asserted numerous grounds for reversal. It conceded in its brief and oral argument, however, that the determinative issue in the litigation was whether the directors had notice, ac-

tual or constructive, of the fraudulent acts of Swingle which resulted in the bank's losses. The Court of Appeals agreed that such was the principal issue. (A. 3) Since the District Court had made detailed findings of fact upon this exact point, the Circuit Court correctly regarded the appeal as a "substantial evidence case". (A. 3-4)

After a thorough review and analysis of the record, the Court of Appeals found the trial court's findings to be fully supported by the evidence (A. 4), and affirmed the judgment.

REASONS FOR DENIAL OF WRIT

The petition for a writ of certiorari should be denied for the reasons that this case involves no question of federal law and the decision of the Court of Appeals is not in conflict with the decision of another court. U.S. Sup. Ct. Rule 19.

The first of the "Questions Presented for Review" set forth in the petition is whether certain acts by a bank president would constitute a crime under the provisions of 18 U.S.C. sec. 656. Obviously, that question of federal criminal law is not presented for review in this civil action. Swingle was prosecuted and convicted for his dishonest and fraudulent acts and any questions as to his criminal responsibility were resolved in that proceeding and are not at issue in this case. *U.S. v. Swingle*, 389 F. 2d 220 (10th Cir., 1968) cert. denied 392 U.S. 928, 88 Sup. Ct. 2285 (1968).

Each of the remaining questions claimed to be presented for review exemplifies the efforts of Petitioner to contrive some issue of federal law which might warrant

the granting of a writ of certiorari in this case. Each of these questions seeks to premise liability of the directors or exoneration of Petitioner upon the directors' knowledge or approval of "excess loans" made by the bank's president.

This is apparently an indirect reference to 12 U.S.C. Sec. 93, which provides, *inter alia*, for personal liability of any national bank director who knowingly participates in or assents to a loan in excess of the limitation prescribed in 12 U.S.C. Sec. 84 upon the amount which may be loaned to a single borrower. Such theory of defense or third-party liability was not relied on by Petitioner in the District Court and was first asserted as the penultimate point in Petitioner's brief in the Court of Appeals.

That court considered the contention concerning excess loans and rejected it as inapposite to the case:

> "The appellant also urges that the directors in some manner participated in the wrongdoing or were grossly negligent by reason of granting excess loans to certain customers whose accounts were used by Swingle in the manner described above. The record demonstrates that the excess loans were not the fraud or the wrongdoing upon which the action was based, but instead were a device used by Swingle to hide his prior wrongdoing of which the directors were unaware." (A. 9)

While the questions set forth in the petition may pose interesting hypotheses for jurisprudential debate, they are not issues involved in this case and provide no basis for granting the requested writ.

Assuming arguendo that an issue of the director's liability for losses on excess loans was involved in this action, Petitioner has, nevertheless, no basis upon which to as-

sert its contention at this stage of the litigation. In order for a national bank director to be personally and individually liable for losses sustained on excess loans, he must *knowingly* participate in or assent to the transaction. 12 U.S.C. Sec. 93.

The District Court conclusively found that the directors did not knowingly approve any excess or illegal loans because the fraudulent and dishonest activities of Swingle precluded their being aware of the true nature and circumstances of the transactions involved. The transactions shown on the bank's books as loans were, in reality, mere shams contrived by Swingle to fraudulently conceal his defalcations. The trial court further found that the directors were not, in any respect, negligent in not further investigating the transactions. (e.g., A. 28, 41)

Upon the failure of Petitioner to establish either that the directors knew of Swingle's wrongdoing or that they were negligent in their supervision of the affairs of the bank, both its defense and its third-party claim failed. As noted above, the cruciality of that determination of fact was conceded on appeal by Petitioner in its brief and oral argument. It was also recognized as the principal issue by the Court of Appeals. (A. 3) That is why, of necessity, Petitioner sought so vigorously to have the Court of Appeals overturn the findings of fact made by the District Court and why it now seeks such action by this Court.

The Court of Appeals, reviewing the evidence of record, found the trial court's findings of fact to be supported by substantial evidence and free from apparent error. (A. 4) It properly refused to set aside the District Court's findings. Fed. Rules Civ. Proc., Rule 52 (a); *Zenith Radio*

Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 Sup. Ct. 1562, 23 L. Ed. 2d 129 (1969); *Butler Paper Co. v. Business Forms, Ltd.*, 424 F. 2d 247 (10th Cir. 1970); *National Farmers Union Service Corp. v. United States*, 400 F. 2d 483 (10th Cir., 1968). The requested writ of certiorari should not be granted when the sole result would be to afford Petitioner an additional opportunity to urge the acceptance of a set of inferences from the evidence contrary to the findings of the trial court.

As further reasons for granting the requested writ, Petitioner argues that the opinion of the Court of Appeals is contradictory to previous decisions of this Court and other courts. Particular emphasis is given to the contention that "The Court of Appeals has absolutely contradicted the holding in *Corsicana National Bank v. Johnson*, 251 U.S. 68, 87, 40 S. Ct. 82, 64 L. Ed. 141." Review of that decision discloses, however, that the two cases are readily distinguishable and not in conflict.

In that case, the maximum amount that the bank could legally lend to a single borrower was $20,000.00. During an absence from the bank of the president, Johnson, who was vice president and a director, loaned $30,000.00 to Fred Fleming and D. A. Templeton, who were engaged in business under the firm name of Fleming & Templeton. Although separate $15,000.00 notes were signed to evidence the loan, it was inferable that the transaction was a single loan. After a complicated series of transactions which are not material, the bank was unable to collect the entire loan.

The bank then sued Johnson to recover its loss, basing its claim upon the statutory provision now embodied in 12 U.S.C. Sec. 93. The trial court directed a verdict in

favor of Johnson and the judgment thereon was affirmed by the Circuit Court of Appeals without opinion.

This Court in *Corsicana National Bank v. Johnson, supra,* reversed and remanded the case for a new trial, since, from the evidence the jury might have found that the two loans were really one loan in an excessive amount, for which Johnson was liable. It was specified, however, that this Court, by its opinion, did not intend to intimate what conclusion a jury should reach upon hearing the evidence (251 U.S. 68 at page 72, 40 Sup. Ct. 82 at page 84).

Particularly significant in that case is the fact that Johnson assented to a renewal of the loans some six months after the Comptroller of Currency had severely criticized the loan as excessive and had directed its reduction to the legal limit.

In this case, Petitioner has been awarded judgment against Swingle and Roberts, the only two of the directors who had knowledge of the wrongful abstractions of the bank's funds. As previously discussed, because of Swingle's fraud, the other directors cannot be said to have knowingly assented to any of the transactions from which the bank suffered losses.

Petitioner contends that the Jones and Small notes were an excess loan rendering the directors liable and terminating Petitioner's obligations under the policies. That contention completely ignores the finding of the trial court that the Jones-Small transaction was not actually a loan, but was a sham contrived by Swingle to fraudulently conceal his wrongdoing.

It is, therefore, clear that the Court of Appeals' opinion is not in conflict with *Corsicana National Bank v.*

Johnson, supra, but, on the contrary, is completely distinguishable.

Petitioner also asserts that the decision of the Court of Appeals contradicts the holdings in *Guarantee Company of North America v. Mechanics Savings Bank & Trust Co.*, 183 U.S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253 (1902), and *Picklesimer v. United States Fidelity & Guaranty Co.*, 54 F. 2d 1022 (4th Cir., 1932). Neither of these cases is in conflict with the opinion in this case, however, because they involved entirely different issues. In each, the surety was absolved of liability on a surety bond for the sole reason that the obligee had made false representations in the application, thereby inducing the surety to assume an obligation which it would not have undertaken otherwise.

Neither are any of the Oklahoma cases cited in the petition contradictory to the decision of the Court of Appeals. *Phoenix Insurance Co. of Hartford v. Newell*, 60 Okla. 207, 159 Pac. 1127 (1916), and *Great Southern Life Insurance Co. v. Long*, 93 Okla. 129, 219 Pac. 926 (1923), each affirmed the well-settled proposition that an employer who retains an agent in a position of trust with knowledge of his guilt of acts of moral turpitude, without notifying the agent's surety, releases the surety from further liability. Since, in this case, the bank was found to have had no knowledge or notice of Swingle's criminal misconduct, there is obviously no conflict in the decisions. *Briggs v. J. R. Watkins Co.*, 195 Okla. 254, 157 P. 2d 462 (1945), decided only issues of agency and contract law which have no relevance to this case.

Each of the other cases referred to by Petitioner, *U.S. v. Fortunato*, 402 F. 2d 79 (2nd Cir., 1968), *Benchwick v.*

U.S., 297 F. 2d 330 (9th Cir., 1961), *U.S. v. Marinelli*, 142 F. 2d 446 (3rd Cir., 1944) and *U.S. v. Caplan*, 123 F. Supp. 862 (W.D. Pa., 1954), rev'd. on appeal 222 F. 2d 875 (3rd Cir., 1955), was a criminal proceeding and does not conflict in any manner with the opinion of the Court of Appeals.

The determinative issue in this litigation is, and has been throughout its course, one of fact: Did the bank's directors have knowledge of Swingle's criminal misapplications of the bank's funds or, alternatively, were they negligent in failing to discover such information? The District Court, sitting without a jury, found the directors to have been without knowledge of his defalcations and to have been completely conscientious and blameless in their supervision of the bank. The Court of Appeals determined that those findings were free from error and were supported by substantial evidence. The Petitioner now seeks the issuance of a writ of certiorari so that it may reiterate its previously-rejected contentions concerning the evidence.

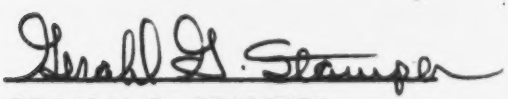
CONCLUSION

The findings, conclusions and judgment of the District Court and the opinion of the Court of Appeals are correct, proper and completely in accordance with the applicable principles established long ago by this Court in *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662 (1891).

Respondent The First National Bank of Cushing respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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